

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
DIVISION THREE

Sylvia Pentel,) COURT FILE NO. 3-11-123
)
Plaintiff,)
)
vs.)
) **COMPLAINT**
City of Mendota Heights,)
)
Defendant.)

Sylvia Pentel, as and for her Complaint against defendant herein, states and alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief, as well as damages and other relief, arising under the Communications Act of 1934 as amended, 47 U.S.C. §151 et seq. and the rules and regulations of the Federal Communication Commission ("FCC") promulgated thereunder, 47 C.F.R. Part 97: under Article I, Section 8 and Article IV, Section 2 of, and the First and Fourteenth Amendments to, the United States Constitution.

2. Plaintiff, Sylvia Pentel, is, and at all relevant times has been, a property owner and resident of the City of Mendota Heights, Dakota County, Minnesota. Plaintiff is a federally licensed amateur radio operator and private, noncommercial amateur (also known as "ham") radio station owner, holding an amateur radio operator license and the amateur radio station license with the call letters NOMRW, both issued by the FCC.

3. Defendant, City of Mendota Heights ("CMH"), is, and at all relevant times has been, a municipal corporation existing under the laws of the State of Minnesota, located in Dakota County, Minnesota. Pursuant to the powers vested in it under Minnesota law, CMH has enacted a Zoning Ordinance of the City of Mendota Heights ("Zoning Ordinance"), which regulates the use of, and erection and maintenance of structures upon, property located within CMH. A copy of relevant portions of the Zoning Ordinance, as in effect presently and at all relevant times, is attached hereto as Exhibit A.

4. The Zoning Ordinance, on its face and as applied by defendant, limits the heights of private amateur radio antennas which may be erected and maintained within CMH to 25 feet unless a variance is obtained from CMH.

5. As more particularly alleged below, the radio antenna limitation contained in the Zoning Ordinance and its application by defendant, are unreasonable and arbitrary in that they so restrict plaintiff's ability to receive and transmit radio communications within the terms of her federally granted amateur radio licenses as to constitute a denial thereof, as well as a denial of plaintiff's constitutional rights of free speech, assembly and association.

6. At all relevant times and in all respects herein, defendant was acting under color of the Zoning Ordinance and the laws of the State of Minnesota. In so doing, defendant has, under color of state law, deprived plaintiff of rights and privileges

secured to her by the First and Fourteenth Amendments to the United States Constitution.

7. The amount in controversy herein, exclusive of costs, exceeds the sum of \$10,000.00. This Court has jurisdiction over the matters asserted herein pursuant to 28 U.S.C. §§1331, 1337 and 1343. Declaratory relief as requested herein is authorized pursuant to 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure.

8. Venue is proper in the District of Minnesota pursuant to 28 U.S.C. §1391(b), because the claims asserted herein rose in this judicial district and because defendant resides in this district.

FACTS RELEVANT TO ALL COUNTS

9. Plaintiff's amateur radio operator and amateur radio station licenses have been issued by the FCC in the public interest, convenience and necessity, pursuant to federal law, for the purpose of receiving and transmitting radio signals throughout the United States and the world. Pursuant to those licenses, plaintiff presently operates, albeit on a severely limited and ineffective basis, an amateur radio station under the call letters NOMRW at her residence, 566 Fremont Avenue, Mendota Heights, Minnesota. Plaintiff has been federally licensed as an amateur radio operator for more than four years, and has made a substantial monetary investment in her radio equipment.

10. The effective exercise of plaintiff's amateur radio

licenses requires that plaintiff have access to an appropriate antenna. Plaintiff is desirous of erecting upon her premises a radio antenna system of sufficient height to enable her regularly and effectively to receive and transmit radio signals worldwide, pursuant to her federally granted licenses, at the amateur radio station which she maintains at her residence.

11. The antenna system which plaintiff proposes to erect is commercially manufactured and consists of a retractable tower and antenna. The retracted height of the tower and antenna is approximately 35 feet. The maximum extended height of the tower and antenna is approximately 68 feet.

12. An antenna equivalent in height to the fully extended height of plaintiff's proposed antenna system is necessary if plaintiff is to be able to communicate regularly and effectively on the radio wavelengths permitted by plaintiff's federally granted license. While radio communication on the wavelengths assigned to plaintiff is theoretically possible with antennas of lesser height, communication with such antennas is so uncertain, so random and so frequently impossible for extended periods, as to render it ineffective.

13. In December, 1990, plaintiff secured the necessary documents to apply for a variance to the 25-foot height limitation as to structures in an R-1 zone of Mendota Heights. The necessary materials were submitted to the defendant on or before January 8, 1991, for a variance from the provisions of the Zoning

Ordinance, in order to install her proposed amateur radio antenna system. Pursuant to the requirements of the Zoning Ordinance, a public hearing was held thereafter before the Planning Commission on plaintiff's application. Plaintiff provided testimony and documentary evidence as to the necessity of the proposed antenna system for reliable amateur communications. Additionally, plaintiff otherwise made a substantial showing in favor of her application.

14. Immediately upon close of the hearing on January 22, 1991, the Planning Commission voted unanimously to recommend denial of plaintiff's application.

15. On February 5, 1991, a public hearing was held before the City Council of the City of Mendota Heights. During the course of the hearing which was adjourned and reconvened from February 5, 1991 to February 19, 1991, plaintiff produced testimony and documentary evidence as to the nature of her amateur communications and the necessity of the proposed antenna system for reasonably reliable amateur communications. Additionally, all of the materials presented to the Planning Commission were made available to the City Council. No evidence or testimony was presented which contradicted or challenged the necessity of the proposed antenna system for reasonably reliable amateur communications.

16. Immediately upon the close of the public hearing on plaintiff's application on February 19, 1991, the City Council of

the City of Mendota Heights unanimously voted to deny plaintiff's application, but issued a special-use permit to allow plaintiff to maintain an existing antenna system inadequate for reasonably reliable communications. No evidence or testimony was presented contradicting plaintiff's assertion that the antenna system approved by the Council was wholly inadequate to provide reasonably reliable amateur communications.

COUNT I

17. Plaintiff repeats and realleges the allegations of paragraphs 1 through 16 of the Complaint as though fully set forth herein.

18. Amateur radio operators provide an invaluable public service to the local, national and international communities in terms of emergency communications assistance and international relations. The FCC, which is charged with the overall responsibility to regulate interstate and foreign commerce in communication by wire and radio, has expressly recognized, in its rules and regulations, the need to encourage amateur radio communications and guarantee the amateur radio operator sufficient radio frequencies for overseas, emergency and experimental communications.

19. There is a direct correlation between the height and configuration of an amateur radio antenna, and the range and effectiveness of amateur radio communications. Effective domestic and international communications are not possible if directional

antennas are prohibited at a height in excess of 25 feet. In restricting directional amateur antenna height to 25 feet, the zoning Ordinance unreasonably inhibits amateur radio communications.

20. On September 19, 1985, the FCC issued a Memorandum Opinion and Order, constituting a declaratory ruling having the force of law, entitled "Amateur Radio preemption," 101 F.C.C. 2d 952 (1985), 50 Fed. Reg. 38,813 (hereinafter, "PRB-1"). This ruling addressed, among other things, the inhibitory effect which local antenna height restrictions have on amateur radio communications. The FCC ruled in PRB-1 that "[s]tate and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted." The FCC further ruled that "local regulations which involve placement, screening or height of antennas based on health, safety or aesthetic considerations, must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." A complete copy of PRB-1 is attached hereto as Exhibit B.

21. The provisions of the Zoning Ordinance, and their application by defendant in denying plaintiff's request for permission to construct the proposed antenna system, effectively preclude and frustrate amateur radio communications by plaintiff, and are in direct contravention of the federal policies articulated in PRB-1.

22. By virtue of the explicit exercise by the FCC of its preemptive statutory powers in PRB-1 as set forth above, the height restriction of the Zoning Ordinance as it applies to amateur radio towers and antennas, which is in direct contravention of federal law in violation of Article VI, Section 2 of the United States Constitution, must be preempted and declared to be of no force and effect.

COUNT II

23. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 16 and 1 through of the Complaint as though fully set forth herein.

24. The radio antenna height restriction contained in the Zoning Ordinance is unconstitutional on its face and as applied insofar as it constitutes an unreasonable burden upon radio communications and interstate commerce, in violation of Article I, Section 8 of the Unit States Constitution.

COUNT III

25. Plaintiff repeats a realleges the allegations contained in paragraphs 1 through 16, 18 through 24 of the Complaint as though fully set for herein.

26. The radio antenna height restriction contained in the Zoning Ordinance, and defendant's actions in furtherance thereof, are void and unconstitutional because they deprive plaintiff of the full and unfettered enjoyment of her First Amendment rights of free speech, assembly and association, through unreasonable prohibitions and limitations on the instrumentalities used by

her to exercise those rights. The enjoyment by plaintiff of said rights is guaranteed by the Fourteenth Amendment to the United States Constitution.

COUNT IV

27. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 16, 18 through 22, 24, and 26 of the Complaint as though fully set forth herein.

28. Height restrictions on radio antennas contained in the Zoning Ordinance is void and unconstitutional on its face and as applied to plaintiff insofar as it constitutes an invalid exercise of the police power of defendant. The said height restriction bears no reasonable relationship to the public safety, health, morals or general welfare, and application thereof is unreasonable, arbitrary, discriminatory, oppressive, and confiscatory, and constitutes an unwarranted interference substantial property rights.

WHEREFORE, plaintiff demands relief as follows:

1. That this Court issue a declaratory judgment:

(a) that the radio antenna height restriction contained in the Zoning Ordinance, on its face and as applied to plaintiff is inconsistent with, and preempted by, federal law, and is therefore without force or effect; and/or

(b) that the radio antenna height restriction contained in the zoning Ordinance is null and void on its face and as

applied to plaintiff is violative of the United States Constitution.

2. That this Court permanently enjoin and restrain defendant from further interference with plaintiff's plans to erect and maintain the proposed amateur radio antenna system on her property.

3. The plaintiff receive an award of damages against defendant in an amount not presently determined, together with an award of attorneys' fees and costs in this action and in the administrative proceedings before the Planning commission and City Council.

ROEDLER & BELLOWS

DAATED: March 4, 1991

By s/ John B. Bellows, Jr.
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